Sunsui Realty Sdn Bhd v Orix Credit Malaysia Sdn Bhd & Anor

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO BA-22NCvC-219–06 OF 2023
ELAINE YAP JC
18 NOVEMBER 2024

Land Law — Judicial sale — Application to nullify — Plaintiff after buying land at public auction discovered Tenaga Nasional Bhd ('TNB') tower and high-voltage power lines over land — Plaintiff's search on land title before buying did not reveal existence of TNB's right of way — Proclamation of sale also did not disclose TNB's right of way or existence of structures — Plaintiff did not view land before buying — Whether plaintiff's application to nullify auction sale and obtain refund of its deposit could not be allowed — Whether principle of caveat emptor applied as plaintiff could have easily seen the TNB structures if visual inspection was done — Whether vendor therefore had no equitable duty to disclose existence of TNB's right of way or of its structures

The plaintiff had bought a piece of land for RM8.1m at a court-ordered public auction. The judicial sale was ordered when the court allowed the first defendant to foreclose the land charged to it by the second defendant owner. After paying the 10% deposit in the sale, the plaintiff discovered a pylon supporting high-voltage transmission cables belonging to Tenaga Nasional Bhd ('TNB tower and lines') over part of the land. Claiming that this fact was not disclosed in the proclamation of sale and that it significantly reduced the usable area of the land, the plaintiff filed the instant action to nullify the auction sale and obtain the return of its deposit apart from seeking general and exemplary damages against the defendants. The plaintiff contended that since TNB had a right of way over the land, the non-disclosure of this fact in the proclamation of sale was a misrepresentation that vitiated the auction sale. The plaintiff admitted that though it did not physically view the land before buying it, its official title search on the land did not disclose the existence of the right of way. The second defendant denied any involvement in the auction process. The first defendant contended that it had no duty to disclose the existence of TNB's right of way and that the plaintiff was bound by the principle of caveat emptor.

Held, dismissing the plaintiff's claim:

(1) The equitable duty of disclosure in contracts for the sale of land required full disclosure by the vendor of defects to title that materially limited the proprietary rights of the buyer; and which a buyer could not be expected

to discover for itself with the care ordinarily used in such transactions such that further inquiries would be warranted. In such circumstances, caveat emptor would not apply to relieve the vendor (see para 42).

(2) The difficulty for the plaintiff in this case was that one of the factors that must be present for the equitable duty of disclosure to arise was that the defect in title was one which the buyer could not be expected to discover for itself with the care ordinarily used in such transactions (see para 44).

(3) The care ordinarily used in an auction sale of property on an 'as-is-where-is' basis (as was the case here) would include a visual inspection of the land. The existence of the TNB tower and lines could have been easily discovered, leading to further inquiries that would have uncovered TNB's right of way (see para 45).

(4) As an exception to the caveat emptor rule, equity might be invoked not to aid the indolent, but only where the defect in title could not reasonably be expected to have been discovered in the first instance. As the plaintiff could have easily discovered the existence of the TNB tower and lines if it had viewed the land, the equitable duty of disclosure did not arise and caveat emptor applied. Accordingly, the auction sale was not annulled and the plaintiff's claim was dismissed (see paras 46–47).

[Bahasa Malaysia summary

Plaintif telah membeli sebidang tanah dengan harga sebanyak RM8.1 juta ketika lelongan awam oleh mahkamah. Lelongan secara kehakiman dibuat apabila mahkamah membenarkan defendan pertama menyita tanah yang dicagarkan kepadanya oleh pemilik defendan kedua. Setelah membayar deposit sebanyak 10% untuk pembelian, plaintif menemui tiang yang menyokong kabel transmisi voltan tinggi milik Tenaga Nasional Bhd ('menara dan jaringan TNB') di sebahagian tanah tersebut. Mendakwa bahawa fakta ini tidak didedahkan dalam pengisytiharan penjualan dan bahawa ianya mengurangkan keluasan tanah yang boleh digunakan secara ketara, plaintif memfailkan tindakan ini untuk membatalkan lelongan dan mendapatkan semua wang depositnya selain dari menuntut ganti rugi am dan teladan terhadap defendan. Plaintif menghujahkan bahawa memandangkan TNB mempunyai hak laluan ke atas tanah itu, mereka tidak mendedahkan fakta ini dalam pengisytiharan penjualan yang mana ianya adalah salah nyata yang mencemarkan penjualan lelongan. Plaintif mengakui bahawa walaupun mereka tidak melihat tanah itu secara fizikal sebelum membelinya, carian hak milik rasminya di tanah itu tidak mendedahkan kewujudan hak laluan. Defendan kedua menafikan sebarang penglibatan dalam proses lelongan. Defendan pertama menghujahkan bahawa mereka tidak mempunyai kewajipan untuk mendedahkan kewujudan hak laluan TNB dan plaintif terikat dengan prinsip caveat emptor.

Diputuskan, menolak tuntutan plaintif:

(1) Kewajipan pendedahan secara ekuiti dalam kontrak penjualan tanah memerlukan pendedahan penuh oleh penjual mengenai kekurangan kepada hak milik secara material mengehadkan hak proprietari pembeli; pembeli tidak boleh diharapkan untuk menemui sendiri dengan cara yang biasa digunakan dalam urus niaga sedemikian supaya pertanyaan lanjut boleh dibuat. Dalam keadaan sedemikian, caveat emptor tidak terpakai untuk melepaskan liabiliti vendor (lihat perenggan 42).

(2) Kesukaran plaintif dalam kes ini adalah bahawa salah satu faktor yang seharusnya ada adalah kewajipan pendedahan secara ekuiti bahawa kekurangan hak milik adalah salah satu yang pembeli tidak boleh diharapkan untuk menemuinya sendiri dengan cara yang biasa digunakan dalam urus niaga tersebut (lihat perenggan 44).

(3) Cara yang seharusnya digunakan dalam lelongan hartanah adalah atas dasar 'sedia ada'(seperti yang berlaku di di dalam kes ini) merangkumi pemeriksaan tanah secara fizikal. Kewujudan menara dan jaringan TNB boleh ditemui dengan mudah yang membawa kepada siasatan lanjut yang akan mendedahkan hak laluan TNB (lihat perenggan 45).

(4) Sebagai pengecualian kepada peraturan caveat emptor, ekuiti bukan untuk membantu orang yang leka, tetapi ianya untuk memulihkan kekurangan pada hak milik yang tidak dapat dijangkakan secara munasabah yang telah ditemui pada mulanya. Memandangkan plaintif boleh mengetahui kewujudan menara dan jaringan TNB dengan mudah sekiranya melihat tanah itu, kewajipan pendedahan secara ekuiti tidak timbul dan caveat emptor digunapakai. Oleh itu, lelongan tersebut tidak dibatalkan dan tuntutan plaintif ditolak (lihat perenggan 46–47).]

Cases referred to

Ambank (M) Bhd v AIM Edition Sdn Bhd [2022] 1 MLJ 357, FC (refd)

Ann Joo Steel Bhd v Pengarah Tanah dan Galian Negeri Pulau Pinang & Anor and another appeal [2020] 1 MLJ 689, CA (refd)

Bayangan Sepadu Sdn Bhd v Jabatan Pengairan dan Saliran Negeri Selangor & Ors [2022] 1 MLJ 701; [2022] 2 CLJ 1, FC (refd)

M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor [1994] 1 MLJ 294, SC (refd)

Mature Land Sdn Bhd v Atlantic Plantation Sdn Bhd [2013] 4 MLJ 565, CA (refd)

Mohd Zai bin Mustafa (in the capacity of Secretary, and on behalf of the Malaysian Islamic Education Development Organization, known as Majlis Pembangunan Pendidikan Islam Malaysia (MAPPIM)) v Menteri Pendidikan Malaysia & Ors and other appeals [2024] 2 MLJ 384; [2024] 2 CLJ 753, CA (refd)

Nora Hayati v Amanah Raya Bhd [2012] MLJU 1814; [2012] 10 CLJ 634, HC (refd)

QVC Rock Products Sdn Bhd v Pohmix Kuari Sdn Bhd [2024] 3 MLJ 752, CA (refd)
Ranjit Singh a/l Jarnail Singh v Malayan Banking Bhd [2016] 1 MLJ 165, FC (refd)
Richard Curtis & Co Sdn Bhd v Khatijah Abdul Majid [2012] MLJU 1815; [2012] 7 CLJ 878, HC (refd)
SPS Groundworks & Building Ltd v Mahil [2022] EWHC 371, QBD (distd)
Tenaga Nasional Bhd v Majlis Daerah Segamat [2023] 5 MLJ 456; [2023] 9 CLJ 214, CA (refd)

Legislation referred to

Contracts Act 1950 ss 18, 19
Electricity Supply Act 1990 s 11(10)
National Land Code s 257
Rules of Court 2012 O 14A r 1(1), O 18 r 19

Tay Shieh Chin (Ganaeswaren & Latib) for the plaintiff.
Chuah Thiam Ming (Azri Chuah & Yap) for the first defendant.
Hazwan Lee Haris Lee (Shu Yin, Teh & Taing) for the second defendant.

Elaine Yap JC:

INTRODUCTION

[1] The plaintiff purchased 3.9109 hectares of freehold land held under Title Geran 20087, Lot 10477, Mukim Klang, Daerah Klang, Negeri Selangor ('land') at a public auction for RM8.1m. The second defendant is the registered proprietor of the land who had charged it to the first defendant. The auction followed a foreclosure action on the charge and a judicial order for sale.

[2] After paying the 10% deposit of RM810,000, the plaintiff discovered that an electricity transmission pylon that supports Tenaga Nasional Bhd ('TNB')'s overhead high voltage transmission lines ('TNB tower and lines') occupy part of the land. This was not disclosed in the proclamation of sale.

[3] According to the plaintiff, it significantly reduced the usable area of the land. The plaintiff did not pay the balance purchase price under the memorandum of sale and instead, filed this suit to nullify the auction sale and seek the return of the RM810,000 deposit as well as general and exemplary damages against the defendants.

QUESTIONS OF LAW

[4] The pleading is not precise but the plaintiff's claim appears to be premised in contract ie a misrepresentation that induced a contract and which,

by operation of ss 18 and 19 of the Contracts Act 1950, renders the contract voidable at the option of the party whose consent was so compromised.

[5] Misrepresentation is also a tort ie negligent misrepresentations are also known as negligent misstatements, while fraudulent misrepresentations are also known as deceit. That the pleading in this case is capable of supporting an action in tort is important because as highlighted by the defendants, the Federal Court in *Ambank (M) Bhd v AIM Edition Sdn Bhd* [2022] 1 MLJ 357 made it clear that in a judicial sale, no contract is formed between the purchaser and the chargee.

[6] In any case, the crux of the plaintiff's claim is that:

(a) the usable area of the land is less than as stated in the proclamation of sale (3.9109 hectares) due to the presence of the TNB tower and lines on the land;

(b) the defendants were aware of the endorsement of a right of way for the TNB tower and lines on the grant of title (Presentation No 4488/2015 Hak Laluan Talian Elektrik of 1.3270 hectares) ('TNB Right of Way'); and

(c) non-disclosure of the TNB Right of Way in the proclamation of sale constitutes a misrepresentation that vitiates the auction sale.

[7] The plaintiff has applied under O 14A of the Rules of Court 2012 to have the following questions of law determined without a trial:

(a) question 1: whether a chargee is under a duty to disclose easements, caveats, tenancies, restrictions, encumbrances and rights not detectable through official title searches, specifically those that will involve changes to the use, size and area of land in a proclamation of sale?

(b) question 2: whether the failure of a chargee to comply with the provisions of s 257 of the National Land Code will render a sale pursuant to a proclamation of sale void?

(c) question 3: whether the order for sale dated 19 September 2022 is defective and irregular on the principles of res judicata and/or on the reason that it has been considered by the court in an earlier Originating Summons No WA-24FC-425–09 of 2021?

[8] Order 14A r 1(1) of the Rules of Court 2012 ('O 14A') provides as follows:

> (1) The Court may, upon the application of a party or of its own motion, determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that —

(a) such question is suitable for determination without the full trial of the action; and

(b) such determination will finally determine the entire cause or matter or any claim or issue therein.

[9] The principles applicable in considering an O 14A application are not controversial. The Court of Appeal in *Mohd Zai bin Mustafa (in the capacity of Secretary, and on behalf of the Malaysian Islamic Education Development Organization, known as Majlis Pembangunan Pendidikan Islam Malaysia (MAPPIM)) v Menteri Pendidikan Malaysia & Ors and other appeals* [2024] 2 MLJ 384; [2024] 2 CLJ 753 recently summarised it as follows:

> [21] The existence of a *question of law or construction to be determined by the court must be clearly discernible from the pleadings of the parties. The question of law or construction must also be one that is capable of being determined without a full trial of the action*, and hence, the procedure in O 14A may not be appropriate where there are conflicting allegations of fact that affect the determination of the questions of law or construction, or where there are facts in issue that are interwoven with the legal issues raised. Where there exist disputes of fact on the affidavits, the court may, nonetheless, proceed to exercise its discretion to determine whether the undisputed or agreed facts provide a sufficient basis to determine the question of law or construction: see *Bato Bagi & Ors v Kerajaan Negeri Sarawak and another appeal* [2011] 6 MLJ 297; [2011] 8 CLJ 766. *A court should not decline to consider an application under O 14A simply on the basis that the question of law or issue of construction is or appears to be complicated* (see *Petroleum Nasional Bhd v Kerajaan Negeri Terengganu* [2004] 1 MLJ 8; [2003] 4 CLJ 337; [2003] 5 AMR 696; [2003] 1 MLRA 582). *The determination of the application under O. 14A need not necessarily dispose of the entire case*; it suffices if the answer arrived at by the court disposes of 'any claim or issue' in the action (*Wang Bao'An & Ors v Malaysian Airline System Bhd and other cases* [2018] 11 MLJ 585; [2018] 7 CLJ 371). *The question of law or construction, which the court is to determine, must be set out in clear and precise terms* (*Lekaz Constructions Sdn Bhd v KOP Petroleum Sdn Bhd; HSBC Bank Malaysia Bhd (intervener)* [2003] 4 CLJ 377; [2003] 6 AMR 74)

[10] Another point to highlight is that in *Nora Hayati v Amanah Raya Bhd* [2012] MLJU 1814; [2012] 10 CLJ 634, the court has held that a defendant's failure to strike out the plaintiff's action under O 18 r 19 of the Rules of Court 2012 does not preclude it from applying for summary disposal of the suit under O 14A:

> [18] The court agrees with learned counsel for the defendant that relying on the afore-stated authorities, the doctrine of res judicata would not be applicable in this case. This is because the principles applicable in a striking out application under O 18 r 19(1) of the RHC 1980 are quite different from that of an application under O 14A ... The court agrees with learned counsel for the defendant that the Court of Appeal had not 'necessarily and with precision' determined the issues that are now

raised by the defendant in their O 14A application such as to preclude them from making the present application.

[11] Thus, the fact that this court had on 21 March 2024 dismissed applications by the defendants to strike out the suit summarily does not prevent the court from considering the present O 14A application.

ANALYSIS OF QUESTIONS

[12] Broadly speaking, the plaintiff has framed three questions around two issues, namely:

(a) whether an auction sale is void due to non-disclosure of the TNB right of way in the proclamation of sale; and

(b) whether the auction sale is void because of non-compliance with s 257 of the National Land Code.

[13] On a review of the pleadings, I agree with counsel for the defendants that question 2 and question 3 do not arise from the pleadings. Although the plaintiff narrates the history of the foreclosure proceedings that culminated in the auction sale, the sole vitiating factor pleaded in the statement of claim is misrepresentation caused by the defendants' non-disclosure of the TNB right of way in the proclamation of sale.

[14] I therefore decline to answer question 2 and question 3 for the above reason, and also for the following other reasons:

(a) referring to *M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294, it is the chargor who retains the right to object to and set aside the order for sale when there is non-observance of the terms ordered; and

(b) referring to *Ann Joo Steel Bhd v Pengarah Tanah dan Galian Negeri Pulau Pinang & Anor and another appeal* [2020] 1 MLJ 689, the plaintiff cannot collaterally attack the validity of the order for sale and directions given by the High Court in favour of the chargee with due notice to the chargor.

[15] The defendants also opposed the determination of question 1 without trial because they argue that it is not admitted that the TNB right of way is any of the restrictions in title set out in question 1, namely easements, caveats, tenancies, restrictions, encumbrances and rights not detectable through official title searches.

[16] Perhaps question 1 was conceived in an attempt to frame a question of

law of general application, but the plaintiff has quite unnecessarily obfuscated the real question of law in this case by doing so. There is no requirement under O 14A that the question of law must be one of general application. It is just a requirement that it be set out in clear and precise terms.

[17] The intent behind question 1 was made clear during oral submissions and there is no other pleaded subject of non-disclosure other than the TNB right of way. The real question of law that calls for determination is as follows ('reframed question'):

> whether a chargee is under a duty to disclose the existence of the TNB right of way in a proclamation of sale if it is not detectable through official title searches

As parties have been given full opportunity to be heard on the reframed question, this court will consider the reframed question and not the original question 1.

[18] If the answer is affirmative, then the omission is an actionable misrepresentation. If the answer is negative, then the plaintiff's claim for misrepresentation must necessarily fail. Note that I have not discounted the possibility that it may not wholly decide the action. In an actionable misrepresentation, a trial would be necessary to determine if the misrepresentation is innocent, negligent or fraudulent.

[19] In other words, the reframed question is a question of law that can be determined without a full trial and as a key issue in contention, it can wholly or substantially decide the action. As will be apparent shortly, the relevant facts material to the reframed question are undisputed.

[20] The first defendant obtained an order for sale of the land in Originating Summons No BA-24FC-425–09 of 2021 on 28 October 2021. The first defendant filed a summons for directions a year later in application for Execution No BA-38–682–06 of 2022 and the first auction was held on 1 November 2022 ('first auction'). There was no bidder at the first auction.

[21] The plaintiff was the successful bidder at an auction of the land on 18 April 2023 ('second auction'). The second auction was held according to directions given on 19 September 2022 under a second summons for directions in application for Execution No BA-38–1464–11 of 2022.

[22] The second auction was carried out under a proclamation of sale dated 9 March 2023 ('proclamation of sale'). On its successful bid, the plaintiff entered into a memorandum of sale dated 18 April 2023 signed by the Registrar of the e-Lelong Operations Centre and sealed by the High Court. It

is expressed to bind the first defendant and the plaintiff.

[23] The proclamation of sale is in a standard form and has the following title details:

BUTIR-BUTIR HAKMILIK:

No Hakmilik	:	Geran 20087
No Lot	:	Lot 10477
Mukim/Daerah/Negeri	:	Klang/Klang/Selangor
Pegangan	:	Hakmilik Kekal
No Petak/No Tingkat/No	:	Tiada/Tiada/Tiada Bangunan
Keluasan Tanah	:	9.660000 ekar
	:	3.910000 hektar
Pemilik Berdaftar	:	Ma Su Teng
Syarat Nyata	:	Pertanian
Sekatan Kepentingan	:	Tiada
Bebanan/Lain-lain	:	Sebanyak 0.1361 hektar dari kawasan/keluasan asal tanah sebanyak 4.0469 hektar telah diambil milik dan kawasan/keluasan tanah sebanyak 3.9109 hektar adalah selepas mengambil kira pengambilan milik tanah itu.
Kawasan Rizab	:	
Kaveat	:	

LOKASI DAN PERIHAL HARTANAH:

Hartanah tersebut adalah sebidang tanah pertanian dizonkan untuk kegunaan kediaman yang beralamat post di Lot 10477, Jalan Hulubalang 27, Taman Sentosa, 41200 Klang, Selangor Darul Ehsan.

[24] The proclamation of sale does not mention the existence of the TNB right of way. However, it contained the following disclosures, caveats and disclaimers typical of such document and the accompanying conditions of sale:

NOTA: Bakal pembeli adalah dinasihatkan agar membuat carian Hakmilik secara rasmi di Pejabat Tanah dan memeriksa semua tanggungan, bebanan serta mengenal pasti dengan tepat hartanah tersebut sebelum jualan lelongan dijalankan.

HARGA RIZAB:

Hartanah tersebut akan dijual atas 'sepertimana sedia ada' tertakluk kepada satu harga rizab sebanyak RM8,100,000.00 (RINGGIT MALAYSIA: LAPAN JUTA SATU RATUS RIBU SAHAJA) dan kepada syarat-syarat jualan yang dilampirkan. Pembida

2.2 PENDAFTARAN PEMBIDA

(h) Pembida bertanggungjawab untuk mengenal pasti hartanah dan memastikan butir-butir, segala tanggungan dan bebanan hartanah adalah betul dan tepat.

4.3 BAKI HARGA BELIAN

(b) Sekiranya Pembida yang berjaya telah menjelaskan bayaran baki harga belian dalam tempoh satu ratus dua puluh (120) hari dari tarikh jualan, maka:

(vi) Hartanah yang berjaya dilelong adalah dipercayai dan akan dianggap sebagai diperihalkan dengan betul dan dijual tertakluk kepada semua isemen (easement), kaveat, tenansi, tanggungan dan hak (jika ada) yang wujud di atas atau terhadapnya yang timbul untuk mentakrif ia masing-masing dan tiada kesilapan kenyataan yang salah atau deskripsi yang salah akan membatalkan penjualan dan tiada bayaran gantirugi yang akan dibuat.

[25] The TNB tower and lines are of course very large physical structures on the land that are clearly visible to the eye. The plaintiff admits that it did not carry out a physical visual inspection of the land prior to bidding for it at the e-lelong auction on 18 April 2023.

CONDITION OF THE TITLE

[26] The TNB right of way is known to the defendants as it is endorsed on the grant of title as follows:

REKOD URUSAN

No Pers 4488/2015 Hak Laluan Talian Elektrik tanah seluas lebih kurang 1.3270 Hektar telah terlibat dengan talian bekalan elektrik mengikut Seksyen 11, Akta Bekalan Elektrik 1990 didaftarkan pada 4 Disember 2015 jam 09:17:39 pagi (No Rujukan Fail: TNB 10/10/1525)

[27] It is not disputed that there was no acquisition of land by TNB over the affected areas. TNB only holds the legal status of a licensee, acting as a wayleave holder with a right of way over the land (*Tenaga Nasional Bhd v Majlis Daerah Segamat* [2023] 5 MLJ 456; [2023] 9 CLJ 214).

[28] According to s 11(10) of the Electricity Supply Act 1990, the existence of the TNB right of way should also appear as an endorsement on the register document of title.

[29] However, the TNB right of way did not appear on the official title search ('Sijil Carian Rasmi') carried out by the plaintiff. Instead, the TNB right of way appears on a title search dated 21 February 2024 (*sijil carian rasmi hakmilik dan maklumat tidak berkuatkuasa*) produced by the first defendant. It is listed under 'endorsan-endorsan terdahulu yang tidak berkuat kuasa'.

[30] Evidently, the plaintiff did not conduct a search of expired endorsements. It also seems evident that there was an error at the registry in

A classifying the TNB right of way as an expired endorsement because it remains on the title grant. The defendants have not pleaded otherwise and there is no evidence the TNB right of way has been revoked.

ANSWER TO THE REFRAMED QUESTION

B

[31] The plaintiff complains that there is misrepresentation by non-disclosure on the TNB right of way in the proclamation of sale since it is a restriction not detectable through official title searches and involves changes to the use, size and area of land that it affects.

C

[32] The second defendant denies any involvement in the auction process while the first defendant's contention is that there is no misdescription of the land, it has no duty to disclose the TNB right of way and that caveat emptor applies.

D

[33] Although this is an action to annul a judicial sale and not a contract of sale, a good starting point is the following extract from *Chitty on Contracts* (33rd Ed) at para 7–175 (34th Ed 9–184):

E

> Contracts for the sale of land are not uberrimae fidae in the sense that the vendor has to make to the purchase a full disclosure of all material facts. In the absence of actual misrepresentation the general rule is caveat emptor. But certain qualifications must be made because the vendor is under a duty to disclose defects relating to title. Every material defect in the vendor's title must be disclosed, because if the title is in fact defective the vendor will be unable to perform his contract in the absence of a condition that the purchaser should accept a defective title. In consequence, if any such defect is not disclosed the purchaser may rescind the contract or resist a suit for specific performance.

F

G

[34] That a contract for the sale of land is not a contract *uberrimae fidei* was affirmed by Court of Appeal in *QVC Rock Products Sdn Bhd v Pohmix Kuari Sdn Bhd* [2024] 3 MLJ 752:

> [42] It is plain to us that the SPA is not a contract which is of uberrimae fidei (utmost good faith). Thus, the appellant must itself be aware and make its own requisite inspection and inquiry on both lot A and lot B including the physical nature of the sites before entering into the SPA. As a matter of fact, it was the appellant itself who identified and chose lot B in lieu of lot X. The failure of the appellant to carry out its physical visual inspection as well as preliminary survey of both lot A and B is hence fatal to its pleaded claim based on negligent misrepresentation. We are mindful that the appellant attempted to rely on cl 5.3.1 of the SPA to argue that it has 60 days upon the issuance of the TOL to conduct a due diligence on lot B but we find that the purpose of cl 5.3.1 is for legal due diligence on the title but not on the physical state or condition of lot B. The facts of the case of *Gemakota Enterprise Sdn Bhd v Public Bank Bhd* [1998] MLJU 389; [1998] 4 CLJ Supp 476 relied on by the appellant are distinguishable.

H

I

[35] In *Bayangan Sepadu Sdn Bhd v Jabatan Pengairan dan Saliran Negeri Selangor & Ors* [2022] 1 MLJ 701; [2022] 2 CLJ 1, the Federal Court explains caveat emptor as follows:

(a) 'caveat emptor' means 'let the buyer beware'. The rule is that a purchaser should make inspection and inquiry as to that which he is proposing to buy. If a property is being sold on an 'as is where is' basis, this means that it is being sold in its current condition, whatever this condition happens to be;

(b) the principle of caveat emptor is applicable in a case of disclaimer of warranty as to the quality, nature, condition and/or defects of the property sold; and

(c) the principle of caveat emptor will not assist the defendants who do not have any rights, title, interest and/or benefit in the property.

[36] Based on the above, caveat emptor is a general principle that may apply analogously to a judicial sale and it has in fact been so applied. As this court must proceed in a principled manner, I adopt the same test ie in the absence of actual misrepresentation or non-disclosure of material defects to title, caveat emptor applies. However, there is no clear principle in relation to the sale of land, on what exactly is a material defect to title that requires full disclosure.

[37] The plaintiff sought to rely on a UK decision *SPS Groundworks & Building Ltd v Mahil* [2022] EWHC 371 (QB) ('SPS Groundworks'), an action for damages by the seller who accepted the buyer's refusal to complete the sale as a repudiatory breach of contract, and re-sold the land to another buyer.

[38] In *SPS Groundworks*, the buyer claimed that there was misrepresentation in that the property register for the land sold contained a covenant running with the land which rendered development of the land impossible or unsustainable. There were other distinctive facts of that case, but for the present inquiry, the court found that the seller had an equitable duty to disclose the restriction and that the disclosure in the legal pack for the auction was insufficient to bring it to the attention of potential bidders.

[39] The defendants on the other hand, referred to cases such as *Ambank (M) Bhd v AIM Edition Sdn Bhd* [2022] 1 MLJ 357 (different land area) and *QVC Rock Products Sdn Bhd v Pohmix Kuari Sdn Bhd* [2024] 3 MLJ 752 (quarried land). Those cases referred to other cases like *Ranjit Singh a/l Jarnail Singh v Malayan Banking Bhd* [2016] 1 MLJ 165 (caveat); *Mature Land Sdn Bhd v Atlantic Plantation Sdn Bhd* [2013] 4 MLJ 565 (illegal occupier) and *Richard Curtis & Co Sdn Bhd v Khatijah Abdul Majid* [2012] MLJU 1815; [2012] 7 CLJ 878 (different land area).

A **[40]** In all of the abovementioned Malaysian cases, the purchasers were unsuccessful in their attempts to vitiate the sale and/or recover damages. In all of those cases also, the rights of the purchasers were limited, but the quality of the restrictions complained of were not discussed, only that caveat emptor applies and the purchasers were imprudent in not making their own inquiries.

B

[41] Considering the cases cited, this court notes that with regards to the duty of disclosure, the normal rule for commercial contracts is caveat emptor. There has been no prior recognition of the equitable duty of disclosure to temper the effect of the maxim in relation to sale of land and certainly not in relation to judicial sale of land. In specified circumstances, the equitable duty of disclosure should prevail since rules of equity are part of the law in Malaysia, and judicial notice may be taken that the Torrens system is not an infallible system of registration of interests.

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D

[42] Thus, this court is inclined to hold that the equitable duty of disclosure in contracts for the sale of land requires full disclosure by the vendor of defects to title that materially limit the proprietary rights of the purchaser; and which a purchaser could not be expected to discover for itself with the care ordinarily used in such transactions such that further inquiries would be warranted. In such circumstances, caveat emptor will not apply to relieve the vendor.

E

[43] As mentioned, the existence of the TNB right of way should have been noted on the register document of title. For some reason, it was not and the defendants omitted any mention of it in the proclamation of sale. To construe the plaintiff's pleading generously, the plea of an implied duty of good faith could be understood as a reference to this equitable duty of disclosure.

F

[44] However, the difficulty for the plaintiff in this case is this. One of the factors that must be present for the equitable duty of disclosure to arise is that the defect in title is one which a purchaser could not be expected to discover for itself with the care ordinarily used in such transactions.

G

[45] It is this court's finding that the care ordinarily used in an auction sale of a property on an as-is-where-is basis would include a visual inspection of the land. Thus I refer to the principles from *SPS Groundworks* but distinguish that case on its own facts. The existence of the TNB tower and lines in this case could have been easily discovered, leading to further inquiries that would have uncovered the TNB right of way.

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I

[46] This is not a circuitous analysis. As an exception to the caveat emptor rule, equity may be invoked not to aid the indolent, but only where the defect in title could not reasonably be expected to have been discovered in the first instance. As the purchaser could reasonably be expected to have discovered the

TNB tower and lines complained of, the equitable duty of disclosure does not arise and caveat emptor applies.

[47] For the above reason, I would answer the reframed question in the negative. The effect of this determination is that the auction sale is not annulled and the plaintiff's claim must be dismissed. Bearing in mind that the defendants had opposed encl 9, I only award costs of the action of RM5,000 to each defendant.

Plaintiff's claim dismissed.

Reported by Ashok Kumar